



California Fair Political Practices Commission

January 3, 1990

Ruth Sorensen
District Attorney
and Public Administrator
Modoc County Courthouse
Alturas, CA 96101

Re: Your Request for Informal Assistance
Our File No. I-89-656

Dear Ms. Sorensen:

This is in response to your request for advice regarding the responsibilities of Modoc County Supervisor M. W. "Mick" Jones, and the remaining Modoc County supervisors under the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ Because your request does not involve a specific pending decision, we are treating your request as one for informal assistance pursuant to Regulation 18329(c) (copy enclosed).²

QUESTIONS

1. Supervisor Jones owns and operates one of two mobile home dealerships in Modoc County (the "county"). Does Supervisor Jones have a conflict-of-interest in participating in a decision to request that the Department of Corrections site a prison in Modoc County?

2. Among the other supervisors, some have rather large land-holdings, one does part-time surveying work, and one is a barber. Do these supervisors have a conflict of interest in participating

¹ Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Code of Regulations Section 18000, et seq. All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Government Code Section 83114; 2 Cal. Code of Regs. Section 18329(c)(3).)

in the decision to request that the Department of Corrections site a prison in Modoc County?

CONCLUSIONS

1. Supervisor Jones does not have a conflict of interest since the effect of the decision would not be distinguishable from the effect on the public generally.

2. (a) The supervisors who have large landholdings may participate in the decision unless their landholdings are extensive or the recommendations to the Department of Corrections includes specific site suggestions which make it reasonably foreseeable that their real property interests will be materially affected.

(b) The supervisor who does part-time surveying work may participate in the decision unless there are facts which indicate that the decision will have a reasonably foreseeable and material financial effect on the supervisor.

(c) The barber shop business of the supervisor does not constitute a disqualifying financial interest, since the effect of the decision would not be distinguishable from the effect on the public generally.

ANALYSIS

Section 87100 prohibits any public official from making, participating in, or using his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest. An official has a financial interest in a decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official or a member of his immediate family,³ or on:

(a) Any business entity in which the public official has a direct or indirect investment worth one thousand dollars (\$1,000) or more.

(b) Any real property in which the public official has a direct or indirect interest worth one thousand dollars (\$1,000) or more.

(c) Any source of income, other than gifts and other than loans by a commercial lending institution in the regular course of business on terms available to the public without regard to official status, aggregating two hundred fifty

³ An official's "immediate family" includes his spouse and dependent children. (Section 82029.)

dollars (\$250) or more in value provided to, received by or promised to the public official within 12 months prior to the time when the decision is made.

(d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.

Section 87103(a) to (d).

The members of a board of supervisors are public officials. (Section 82048.) Accordingly, they may not make, participate in making, or attempt to use their official position to influence a governmental decision if the decision will have a reasonably foreseeable and material financial effect, distinguishable from the effect on the public generally, on themselves or their economic interests as described by Section 87103.

Foreseeability

The effects of a decision are reasonably foreseeable if there is a substantial likelihood that they will occur. To be foreseeable, the effects of a decision must be more than a mere possibility; however certainty is not required. (Downey Cares v. Downey Community Development Com. (1987) 196 Cal. App. 3d 983, 989-991; Witt v. Morrow (1977) 70 Cal. App. 3d 817, 822; In re Thorner (1975) 1 FPPC Ops. 198 (copy enclosed).) The Act seeks to prevent more than actual conflicts of interest, it seeks to prevent even the appearance of a possible conflict of interest. (Witt v. Morrow, supra at 823.)

Materiality

Regulation 18702 sets forth the guidelines for determining whether an official's economic interest in a decision is "materially" affected as required by Section 87103. If the official's financial interest is directly involved in the decision, then Regulation 18702.1 (copy enclosed) applies to determine materiality. On the other hand, if the official's financial interest is indirectly affected by the decision, then Regulations 18702.2 to 18702.6 (copies enclosed) would apply to determine whether the effect of the decision is material.

Public Generally

Even if the reasonably foreseeable financial effect of a decision is material, disqualification is required only if the effect is distinguishable from the effect on the public generally. (Section 87103.) For the county, the public consists of all residents of the county. Thus, disqualification is required unless the decision will affect the supervisors' financial interests in substantially the same manner as it will affect all

residents of the county, or a significant segment of the residents of the county. (Regulation 18703, copy enclosed.).⁴

1. Supervisor Jones:

The threshold question is whether it is reasonably foreseeable that the decision to request the Department of Corrections to site a prison in the county will have an economic effect on Supervisor Jones or his mobile home business.⁵

The Department of Corrections presently has funding for only two prisons.⁶ Modoc County is one of the counties requesting the Department of Corrections to site a prison in their jurisdiction. As described by you, Modoc County is located in such a remote area, away from transportation facilities and other services that the area may have some drawbacks as a prison site. On the other hand such a remote area may be exactly the type of location that might lead the Department of Corrections to site a prison in the county. Because of our discussion below it is not necessary to determine whether it is reasonably foreseeable that the decision will have an economic effect on Supervisor Jones business.

If the decision has a reasonably foreseeable economic effect on Supervisor Jones' mobile home business, and if such effect is deemed material, Supervisor Jones may participate in the decision only if the decision will affect the business in substantially the

⁴ Copies of In re Owen (1976) 2 FPPC Ops. 77, In re Brown (1978) 4 FPPC Ops. 19, In re Ferraro (1978) 4 FPPC Ops. 62 and In re Legan (1985) 9 FPPC Ops. 1, Commission opinions which explain the application of the concept of public generally, are enclosed for your information.

⁵ A purchaser of a mobile home from Supervisor Jones' business is a source of income to the mobile home business and is also a source of income to Supervisor Jones. Therefore, Supervisor Jones may be prohibited from participating in a decision which will have a reasonably foreseeable and material financial effect, distinguishable from the effect on the public generally, on such source of income. Section 87103.5 provides a very specific "public generally" exception for a retail business where the customers of the retail business constitute a significant segment of the public, and the income received from a specific source involved in the decision is not distinguishable from income received from other retail customers. Regulation 18703.5 (copy enclosed) defines "significant segment" for purposes of Section 87103.5.

⁶ The factual information in this paragraph was provided by you in a telephone conversation on November 30, 1989.

same manner as it will affect all members of the public or a significant segment of the public. (Regulation 18703.) In In re Owen (1976) 2 FPPC Ops 77, 82, the Commission stated:

It is true that under our regulations a single industry, trade or profession does not constitute the "public generally." We do not believe retail merchants constitute a single industry, however. Rather, such merchants constitute a major part of what is generally regarded as the business community and taken as a whole, may reasonably be regarded as "the public generally" within the meaning of Section 87103 and our regulations.

The same rationale would dictate that under the above described circumstances regarding Supervisor Jones, the decision to request that the prison be sited in the county will affect Supervisor Jones business in substantially the same manner as it will affect other retail merchants who, taken as a whole, may reasonably be regarded as the public generally within the meaning of Section 87103. (In re Owen, supra.) Accordingly, Supervisor Jones may participate in the decision to request the Department of Corrections to site a prison in the county since the effect of the decision on his mobile home business would not be distinguishable from the effect on the public generally.

2. The Other Supervisors:

a. Large land holdings: You have stated that some of the supervisors have rather large landholdings. The question remains, of course, whether the decision to request the siting of a prison in the county will have a reasonably foreseeable and material financial effect, distinguishable from the effect on the public generally, on the supervisors' real estate interests.

As discussed above, the effects of a decision are reasonably foreseeable if there is a substantial likelihood that the effects will occur, i.e., if there is a substantial likelihood that the decision will have an economic effect on the supervisors' real estate interests. Unlike mobile homes, which may or may not be purchased by the new residents moving into the county, siting of a prison in the county will definitely entail the sale and purchase of land to site the prison as well as to provide auxiliary services related to the prison. If the supervisors landholdings are extensive, there would be a substantial likelihood that the decision will have an economic effect on their real estate interests and the effects of the decision would be deemed reasonably foreseeable. If the supervisors' landholdings are not extensive, for example, if the supervisor has only one or two small parcels, it does not appear that there is a substantial likelihood that the decision will have an economic effect on their real estate interests unless the request to the Department of Corrections, or the citizens' task force

report on the issue, contains specific site suggestions and such sites are likely to have an economic effect on the supervisors' interests in real estate.

Regulations 18702 through 18702.6 would apply to determine whether the effect of the decision is material. However, even if the effect of the decision is material, a supervisor may be able to participate in the decision if the effect of the decision on the supervisor is substantially the same as the effect on the public, or the effect on a significant segment of the public. Again, if the supervisor's landholdings are extensive, the effects of the decision on the supervisors interests would not be substantially the same as the effect on the public, or on a significant segment of the public, since it is unlikely that the number of people who have extensive landholdings would be large enough to constitute a significant segment of the public.⁷

b. Part-time surveying work: There are no facts to suggest that siting a prison in the county will increase business to the supervisor who does part-time surveying work. Construction of a prison will probably involve a competitive bidding process, and also probably involve a sub-contractor who contracts for the surveying work. Whereas it is possible that the supervisor may be awarded the contract, we do not have any facts to conclude that there is a strong probability that the supervisor will receive the contract. It is difficult to claim under such circumstances that there is a substantial likelihood that the decision will have an economic effect on this supervisor. However, if there are other facts that indicate that there is such a substantial likelihood that the supervisor would be involved in the surveying work, the economic effect will be deemed reasonably foreseeable.

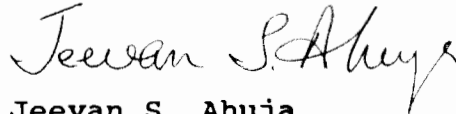
c. The barber: As discussed in connection with Supervisor Jones' mobile home business, the barber is a retail merchant. Even if it is argued that the decision will have a reasonably foreseeable and material financial effect on the supervisor's barber shop business, the decision will affect the business in substantially the same manner as it will affect a significant segment of the public - the retail merchants. Accordingly, the supervisor is not prohibited from participating in the decision unless there are some other facts which indicate that the decision will have a material financial effect on the supervisor's barber shop business which is distinguishable from the effect on the public generally.

⁷ I have enclosed copies of the West Advice Letter, No. A-89-243, the Scher Advice Letter, No. A-88-479 and the Flynn Advice Letter, No. I-88-430, for your information. These letters should be helpful in determining what constitutes a significant segment of the public.

I trust this letter has provided you with the guidance you requested. If you have any further questions regarding this matter, please contact me at (916) 322-5901.

Sincerely,

Kathryn E. Donovan
General Counsel

A handwritten signature in cursive script, reading "Jeevan S. Ahuja".

Jeevan S. Ahuja
Counsel, Legal Division

KED/JSA/aa

Enclosures



California Fair Political Practices Commission

November 20, 1989

Ruth Sorensen
District Attorney
Office of the District Attorney
Modoc County Courthouse
Alturas, CA 96101

Re: Letter No. 89-656

Dear Ms. Sorensen:

Your letter requesting advice under the Political Reform Act was received on November 15, 1989 by the Fair Political Practices Commission. If you have any questions about your advice request, you may contact Jeevan Ahuja an attorney in the Legal Division, directly at (916) 322-5901.

We try to answer all advice requests promptly. Therefore, unless your request poses particularly complex legal questions, or more information is needed, you should expect a response within 21 working days if your request seeks formal written advice. If more information is needed, the person assigned to prepare a response to your request will contact you shortly to advise you as to information needed. If your request is for informal assistance, we will answer it as quickly as we can. (See Commission Regulation 18329 (2 Cal. Code of Regs. Sec. 18329).)

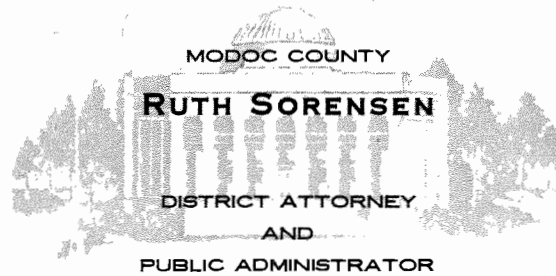
You also should be aware that your letter and our response are public records which may be disclosed to the public upon receipt of a proper request for disclosure.

Very truly yours,

Kathryn E. Donovan
General Counsel

KED:plh

OFFICE OF THE
DISTRICT ATTORNEY
MODOC COUNTY COURTHOUSE
ALTURAS, CALIFORNIA 96101



TELEPHONE:
(916) 233-3939
EXTENSION 212

FAMILY SUPPORT:
EXTENSION 215

November 13, 1989

Fair Political Practices Commission
428 J Street
Suite 800
Sacramento, California 95814

Re: Request for Advice - Conflict of Interest

Gentlemen:

Your written advice pursuant to Government Code Section 83114(b) is requested by me as well as on behalf of Modoc County Supervisor M. W. "Mick" Jones.

Our Board of Supervisors will soon be considering whether to request that the Department of Corrections site a prison in Modoc County. As in other areas of the state, this issue has become highly emotional. The Board has not yet voted on the matter as they are awaiting a report of a citizens' task force that is studying the issue. Supervisor Jones has indicated publicly that he favors the prison as a partial solution to our county's dire economic problems.

Supervisor Jones owns and operates one of the two mobile home dealerships in Modoc County. A group of citizens has written a letter to Mr. Jones demanding that he disqualify himself from voting on the prison issue (presumably because he might be able to sell more mobile homes to people moving into the area to work for the prison). They have also written to me indicating that they expect me to try to have him disqualified. Copies of both letters are enclosed.

As an additional query, some of our supervisors have rather large land holdings, one does part-time surveying work, and one is a barber. I anticipate that similar questions will come up with reference to these supervisors as well.

Fair Political Practices Commission
November 13, 1989
Page 2

Your early reply will be appreciated as the Board will need to act on this matter in the near future.

Singerely,

A handwritten signature in cursive script that reads "Ruth Sorensen".

RUTH SORENSEN

District Attorney

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cc: M. W. "Mick" Jones

November 7, 1989

RECEIVED

NOV 13 1989

MODOC CO.
DISTRICT ATTORNEY

Ruth Sorensen
Modoc County District Attorney
Courthouse
Alturas, CA 96101

Dear Mrs. Sorensen:

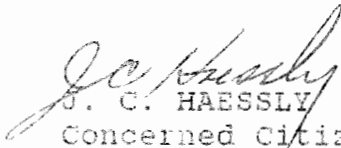
Enclosed is a copy of a letter sent to Mr. Mick Jones, a Modoc County Supervisor. In addition to being a county supervisor, Mr. Jones also owns and operates a mobile home dealership which he started approximately two years ago.


Presently the Modoc County Board of Supervisors is considering a decision on whether or not to allow a state prison facility to be built in the community. Estimates are that the facility may as much as double the size of our community's population. As one of the only two mobile home dealers in the area, Mick stands to make significant financial gains should the county supervisors decide to pursue the prison. The financial gains experienced by Mr. Jones will be much greater than that experienced by the population in general as the bulk of the population are farmers, ranchers, and government employees who will see no financial gain whatsoever.


It is our desire that Mr. Jones handle this matter in a manner that an honest public official should, by disqualifying himself on the issue. However, if he does not, we may be calling on you for assistance in having him disqualified.


If you have any questions, please don't hesitate to call Kerry D. Wilson at (916) 233-5621.


Sincerely,


J. C. HAESSLY
Concerned Citizen


KERRY D. WILSON
Concerned Citizen


MARK MORIARITY
Concerned Citizen


MARILYN W. DICK
Concerned Citizen


MICHAEL E. DUNN
Concerned Citizen

November 7, 1989

Mr. M. W. Jones
H.C.O. 4, Box 45013
Alturas, CA 96101

Dear Mr. Jones:

After reviewing California Conflict Of Interest Law For Public Officials, it is our opinion that you have a definite conflict of interest with regards to the prison issue. We have come to this conclusion based on the following:

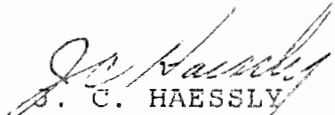
- 1) You are using your official position to influence a governmental decision,
- 2) It is foreseeable that the decision will affect your economic interest,
- 3) The effect of the decision on your economic interest will be material,
- 4) The effect of the decision on your economic interest will be much greater than that of the public generally.


As a result of the above, and consistent with California Law, it is our position that you must disqualify yourself from any decision on the prison issue. Consequently, you may not be counted for purposes of establishing a quorum, and must not vote on, make, participate in any way in, or attempt to influence the decision on the prison.

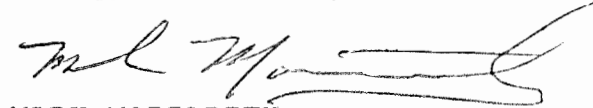
Mr. M. W. Jones
November 7, 1989
Page 2

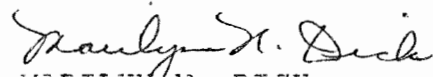
If you have any questions regarding this letter, we suggest that you contact the attorney for the County Board of Supervisors. You may also wish to contact the Legal Division of the Fair Political Practices Commission for advice.


Sincerely,


J. C. HAESSLY
Concerned Citizen


KERRY D. WILSON
Concerned Citizen


MARK MORIARITY
Concerned Citizen


MARILYN N. DICK
Concerned Citizen


MICHAEL E. DUNN
Concerned Citizen

cc: Ruth Sorensen
Modoc County District Attorney

Enforcement Division of the
Fair Political Practices Commission

John K. Van de Kamp
Attorney General